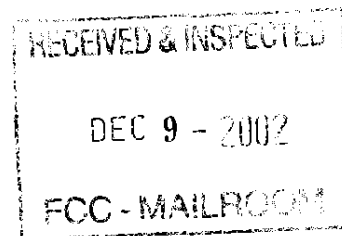


Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of)

Amendment of Section 73.622(b),
Table of Allotments,
Digital Television Broadcast Stations,
(Fort Myers, Florida))

MM Docket No. 00-180
RM-9956

To. Chief, Video Division
Media Bureau

**OPPOSITION TO EMERGENCY MOTION
TO VACATE REPORT AND ORDER**

Fort Myers Broadcasting Company ("FMBC") hereby opposes the Emergency Motion to
Va 31 Report and Order (the "Emergency Motion") filed in this proceeding by Caloosa Television
Corporation ("Caloosa"). Therein Caloosa objects to the following conclusion in footnote two of
Report and Order MM Docket No. 00-180, DA 02-3154 (released November 20, 2002):

Caloosa is the licensee of low power station WBSP-LP, channel 9, Naples, Florida. It opposes the proposed channel substitution because, among other things, its LPTV station will be displaced. Although entitled "Reply Comments," Caloosa's comments are untimely and will be dismissed because they raise new matters that should have been filed during the initial comment period. See Section 1.415(c) of the Commission's Rules. In any event, WBSP-LP is not a Class A-eligible facility and is therefore not entitled to protection against FMBC's proposal. See Establishment of a Class A Service, 15 FCC Rcd. 6355, 6370-71 (2000), clarified on recon., FCC 01-123, para. 8-9 (released April 13, 2001).

Caloosa claims that Station WBSP-LP is a licensed Class A television station and that grant of FMBC's rule making proposal to allot DTV channel 9 to Fort Myers, Florida will cause destructive interference to Station WBSP-LP, effectively modifying or revoking WBSP-LP's license in violation of the provisions of the Communications Act of 1934, as amended.

FMBC notes that Caloosa's Emergency Motion does not dispute the Report and Order. MM Docket No. 00-180's conclusion that Caloosa's "Reply Comments" were untimely and raised new matters that should have been filed in the rule making's initial comment period. Further, FMBC submits that the Report and Order MM Docket No. 00-180 was absolutely correct when it observed that Station WBSP-LP is not a Class A-eligible facility. In fact, WBSP-LP should not be regarded as a licensed facility at all. Its license was forfeited when Caloosa allowed its operating authority to lapse for a period in excess of one year. Facts demonstrating both WBSP-LP's ineligibility for Class **A** status and the forfeiture of its license are before the Media Bureau in the petition for reconsideration FMBC filed with respect to Caloosa's license application, FCC File No. BLTVA-20010712AIK.¹

FMBC submits that, from January 23, 1999 until June 20, 2000, WBSP-LP had no colorable authority to operate. The station lost its transmitter site prior to March 31, 1998 and had operated intermittently under a series of STAs that expired on January 23, 1999. This lapse in WBSP-LP's operating authority resulted in the forfeiture of WBSP-LP's license by operation of law. See Section 312(g) of the Communications Act of 1934, as amended. Accordingly, Caloosa's arguments concerning modification or revocation of its license are misplaced. WBSP-LP has no license.

Even if WBSP-LP were a licensed facility, the Commission has the power to reverse the grant of WBSP-LP's Class **A** status, without invoking procedures for license revocation or license modification. Specifically, FMBC filed a timely and meritorious petition for reconsideration of the

¹Copies of all pleadings, except extensions of time, filed with respect to this license application are appended hereto. They are: (a) Petition for Reconsideration or in the Alternative for Declaratory Ruling filed by FMBC on August 30, 2001, (b) Opposition to "Petition for Reconsideration or in the Alternative for Declaratory Ruling" filed by Caloosa on September 13, 2001, (c) Comments in Support of Caloosa Opposition filed by Post Newsweek Stations, Florida, Inc on September 24, 2001, and (d) Reply filed by FMBC on September 27, 2001.

action granting WBSP-LP's Class A license. Any comprehensive **review** of Caloosa's lengthy history of keeping WBSP-LP off the air must conclude that WBSP-LP was **never** eligible **for** Class A status

In view of the forgoing, FMBC submits that the Emergency Motion is moot, because WBSP-LP forfeited its license on January **24**, 2000. Even if this were not the case, Caloosa's Reply Comments in this proceeding were properly excluded and Station WBSP-LP was **never** eligible for Class A status. The Report and Order MM Docket No. 00-180 should remain in full force and effect.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph A. Belisle". The signature is fluid and cursive, with the first name "Joseph" and last name "Belisle" clearly distinguishable.

Joseph A. Belisle
Counsel for Fort Myers Broadcasting Company

December 6, 2002

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CERTIFICATE OF SERVICE

I, Joseph A. Belisle, hereby certify that I have this 6th day of December, 2002 caused a copy of the foregoing "Opposition to Emergency Motion to Vacate Report and Order" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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Joseph A. Belisle

Fort Myers

**Before the
Federal Communications Commission
Washington, DC 20554**

In Re Application of)	
)	
Caloosa Television Corporation)	
for Conversion of)	FCC File No. BLTVA-20010712AIK
WBSP-LP, Naples, Florida)	
to Class 4 Status)	

To: The Chief, Mass Media Bureau

Petition for Reconsideration or, in the Alternative, for Declaratory Ruling

Respectfully submitted,
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Table of Contents

<u>Summary</u>	1
I. <u>The Facts</u> ..	2
II. <u>Argument</u>	11
Caloosa's License to Operate WBSP-LP was Forfeited on August 7, 1999 by Operation of Law	11
The Video Services Division's Action, Reversing the Chief, Mass Media Bureau's Decision in the Dismissal Order was Void Ab Initio.	13
WBSP-LP Was Never Eligible for Class A Status and Its Application for Class A Status Was Granted on the Basis of Factual Errors and Omissions.	14
III. <u>Conclusion</u>	19

Summary

In January 2000 WBSP-LP filed a patently defective certificate for eligibility for Class A television status that was correctly dismissed by the Chief of the Mass Media Bureau in a decision published June 9, 2000. The Video Services Division granted reconsideration of the Mass Media Bureau's action in an unpublished letter dated August 11, 2000. This letter action was made without delegated authority in derogation of Section 405 of the Communications Act and is therefore void ab initio.

The facts presented by WBSP-LP in support of its claims to Class A status are incomplete and misleading. A correct review of WBSP-LP's operating record demonstrates that, due to factors within the control of WBSP-LP, the station was off the air for almost the entire period from August 8, 1997 through June 17, 2000. Indeed for the nineteen month period from January 23, 1999 through June 20, 2000 the station was entirely without operating authority and, for that reason, its license is forfeit under Section 312(g) of the Communications Act.

Additionally, WBSP-LP's Class A operating status conflicts with Fort Myers Broadcasting Company's request in MM Docket No. 00-180 to substitute in-core DTV Channel 9 for out-of-core DTV channel 53 at Fort Myers, Florida. This full power DTV Channel 9 proposal is a far more efficient use of spectrum than WBSP-LP's television translator operation. A correct weighing of public interest factors requires denial of WBSP-LP's Class A television application.

Petition for Reconsideration or, in the Alternative, for Declaratory Ruling

1. Fort Myers Broadcasting Company ("FMBC") licensee of WINK-TV, Fort Myers, Florida requests that the Chief, Mass Media Bureau reconsider the grant of Class A status to low power television station WBSP-LP, Channel 9, Naples, Florida.' FMBC submits that WBSP-LP did not provide the type of service that could qualify it for Class A status and that no substantial public interest factors justify an award of Class A status to the station. Further, the action of the Chief, Video Services Division reinstating WBSP-LP's certificate of Class A eligibility was ultra vires and of no force or effect. For these reasons, the action granting WBSP-LPs Class A status should be reversed and the above-referenced application should be dismissed or denied. Finally, as demonstrated below; WBSP-LP failed to transmit any authorized signal from its facilities for a period in excess of one year and, by operation of law, its license is forfeit. FMBC requests a declaratory ruling that WBSP-LPs authorizations are canceled and its call sign is deleted.

I. The Facts

2. In August 1989, Caloosa Television Corporation ("Caloosa") acquired the construction permit for Station WBSP-LP (then W09BS), Naples, Florida, from New Florida Broadcasting Company, Inc., it's original permittee. From its inception, WBSP-LP was the poor stepchild to Caloosa's other broadcasting projects. It was first constructed at what was supposed to be a temporary transmitter location atop a building at 660 Tamiami Trail, Naples, Florida, a site with

FMBC is a person aggrieved by the grant of Class A status to WBSP-LP because such status conflicts with FMBC's proposal to allot DTV Channel 9 to Fort Myers, Florida in MM Docket No. 00-180. This is the first opportunity FMBC has had to oppose WBSP-LPs Class A status since June 9, 2000 when the Chief, Mass Media Bureau dismissed WBSP-LPs certificate of eligibility for Class A status. See Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Station Status, 15 FCC Rcd. 9761 (2000) (hereafter the "Dismissal Order").

zoning problems.² Two years later it was moved to the roof of a condominium at 4451 Gulf Shore Boulevard North, Naples, Florida.³ While WBSP-LP was licensed as a low power television station, Caloosa operated it as a television translator, repeating the signal of Caloosa's Fort Myers, Florida LPTV station.⁴

3. The history of Station WBSP-LP from 1995 forward is one of repeated service disruptions and inattention to FCC operating requirements. Specifically in July 1995, the station notified the FCC that it was silent because its transmitter had been removed and shipped to Tennessee for repairs.⁵ The station was granted silence authority through October 7, 1995.⁶ Again in May 1996, Station WBSP-LP's transmitter was in Tennessee for repairs.⁷ The FCC granted WBSP-LP silence authority through August 22, 1996⁸ and WBSP-LP returned to the air August 13,

2

See Letter dated October 11, 1990 from David A. McKelvey, Chief Engineer to Mohammed Habib. See also Broadcast Station License, BLTVL-900802IG.

See Broadcast Station License, BLTVL-930408IC.

4

See Application for Renewal of License, BRTVL-930401XI at Exhibit No. 1; Application for License, BLTVL-930408IC at Exhibit No. 1; Application for Assignment of License (form 316), BALTVL-950925IB at Exhibit No. 2, p. 2; and WBSP-LP's Certificate of Eligibility for Class A Low Power Television Status filed January 28, 2000 at Exhibit No. 1

See Letter dated July 3, 1995 from George E. DeVault, Jr. to William Caton, Acting Secretary, FCC.

6

See Letter dated July 7, 1995 from Keith A. Larsen, Chief, LPTV Branch, to Tamiami Naples, Inc.

7

See Letter dated May 16, 1996 from Dennis J. Kelly to Federal Communications Commission.

8

See Letter dated May 22, 1996 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Tamiami Fort Myers, Inc.

1996.⁹

4. The next news the FCC received of WBSP-LP's operating problems came in January 1997. The FCC was informed that the station was off the air but was not informed of the date the station went off the air or the reason for its silence.¹⁰ Nor was the FCC informed of the date the station resumed operations. The station was, however, operating on or about August 8, 1997. We know this because WBSP-LP's March 31, 1998 license renewal application informed the Commission that:

...WBSP-LP, Channel 9, Naples, Florida last operated on August 8, 1997. Since that time WBSP-LP has lost its transmitter site. WBSP-LP will be filing a request for a Special Temporary Authorization to operate from a different transmitter site, so that the station can return to the air on or prior to August 7, 1998, to avoid losing the station's license by operation of 47 USC §312(g).¹¹

5. On July 16, 1998 WBSP-LP applied for an STA to return to the air "at a temporary site pending the procurement of a new, permanent transmitting site."¹² This STA was granted July 23, 1998 for a period of six months.¹³ WBSP-LP's renewal application was promptly granted.¹⁴

9

See Letter dated August 15, 1996 from Dennis J. Kelly to Federal Communications Commission.

10

See Letter dated January 30, 1997 from Dennis J. Kelly to Federal Communications Commission.

11

See Application for Renewal of License, BRTVL-980331AW at Exhibit No. 2. Apparently, the station was off the air for over seven months without any authority to remain silent.

12

See Letter dated July 16, 1998 from Dennis J. Kelly to Federal Communications Commission, Engineering Statement at p. 1

13

See Letter dated July 23, 1998 from Hossein Hasheinzadeh, Supervising Engineer, LPTV Branch to Tamiami Fort Myers, Inc.

14

See License Renewal Authorization, BRTVL-980331AW, granted July 29, 1998.

Station WBSP-LP resumed broadcast operations on July 31, 1998.¹⁵

6. Station WBSP-LP's operation under the July 23, 1998 STA ceased on August 7, 1998, seven days after it commenced. The reason given for the station's return to silence was "substantial interference to cable channel 9 on the cable television system serving Naples, Florida."¹⁶ On September 15, 1998 the FCC granted WBSP-LP silence authority through December 15, 1998.¹⁷

7. In January 1999, WBSP-LP wrote the FCC seeking an extension of its silence authority, stating that it was studying the cable television interference problem to determine a solution.¹⁸ The Commission responded, extending the station's silence authority through March 15, 1999.¹⁹ Predictably, on March 15, 1999, Caloosa requested a further extension of silence authority. Therein Caloosa stated that it was in discussions to relocate WBSP-LP to a building owned by Collier County, Florida.²⁰ The FCC granted Caloosa's request and extended WBSP-LP's silence

¹⁵

See Letter dated August 5, 1998, from Dennis J. Kelly to Federal Communications Commission.

¹⁶

See Letter dated September 10, 1998 from Dennis J. Kelly to Federal Communications Commission. What WBSP-LP didn't say is that it had selected a cable television headend as its temporary transmitter site.

¹⁷

See Letter dated September 15, 1998 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Tamiami Fort Myers, Inc.

¹⁸

See Letter dated January 22, 1999 from Dennis J. Kelly to Federal Communications Commission. Not surprisingly, the "solution" was a reduction in ERP, but it took WBSP-LP nineteen months to arrive at that conclusion. See *infra* para. 15.

¹⁹

See Letter dated February 10, 1999 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation. Therein Caloosa was cautioned that "any further request must be accompanied by a progress report as to your efforts to resume operations."

²⁰

See Letter dated March 15, 1999 from Dennis J. Kelly to Federal Communications Commission.

authority through June 15, 1999."

8. Caloosa again sought an extension of WBSP-LPs silence authority on May 25, 1999. Again it recited interference to the Naples CATV system and related efforts to negotiate a transmitter site lease." Again the Commission extended WBSP-LPs silence authority.²³

9. With the one year anniversary of its silence looming on the horizon, Station WBSP-LP returned to the air for the eight day period from June 14 to June 22, 1999.²⁴ It is not clear just how Station WBSP-LP accomplished this. Its July 23, 1998 STA expired on January 23, 1999 and the station was completely without operating authority. The last authorized WBSP-LP transmission facilities had interfered with a cable television system and WBSP-LP considered this interference sufficient grounds for making the station silent. In any event, as of June 22, 1999, WBSP-LP had a new excuse for being silent.

10. Specifically, in a second letter dated July 30, 1999, WBSP-LP stated that it left the air on June 22, 1995 as a result of a "massive transmitter failure," and requested additional silence

²¹

See Letter dated March 23, 1999 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation.

²²

See Letter dated May 25, 1995 from Dennis J. Kelly to Federal Communications Commission.

²³

See Letter dated May 27, 1999 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation. This new extension of silence authority expired September 15, 1999.

²⁴

See Letter dated July 30, 1999 from Dennis J. Kelly to Federal Communications Commission.

authority.²⁵ This request was granted and WBSP-LP's silence authority was extended through November 16, 1999.²⁶

11. In a November 15, 1999 letter from Dennis J. Kelly to the Commission, WBSP-LP again sought additional silence authority, reciting that its engineers were working on plans to relocate the transmitter site and that "[t]his, together with repairs to WBSP-LP's transmitting equipment, will allow WBSP-LP to return to the air." The Commission granted WBSP-LP's request and extended its silence authority through February 16, 2000.

12. On January 28, 2000, WBSP-LP filed a Statement of Eligibility for Class A Low Power Status. In support of its request for Class A status, WBSP-LP stated that it was "temporarily off the air due to equipment failure." It justified its claim to Class A on the following basis:

When it was on the air, WBSP-LP rebroadcast the programming of WEVU-LP in the Naples area (Naples is approximately 37 miles south of Fort Myers). WEVU-LP is an LPTV station which operates 24 hours per day, provides over 3 hours per week of programming produced in the Fort Myers-Naples market, and which adheres to the regulations applicable to LPTV stations generally. When it returns to the air, WBSP-LP will operate in tandem with WEVU-LP, on the same operating schedule, with the same programming, and with the same policy relative to adherence to the Commission's LPTV station rules.

13. WBSP-LP remained off the air after filing its January 28, 1999 Class A eligibility

²⁵

See Letter dated July 30, 1999 from Dennis J. Kelly to Federal Communications Commission. This was the third serious transmitter failure of WBSP-LP since July 1995.

²⁶

See Letter dated August 16, 1999 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation.

²⁷

Of course, WBSP-LP had already returned to the air on June 14, 1999, without securing a new transmitter site.

statement. It filed a February 14, 2000 request to extend silence authority,²⁸ which the Commission granted through May 16, 2000.²⁹ This silence authority briefly lapsed and was reinstated in response to Dennis J. Kelly's June 9, 2000 letter on behalf of the station to Mr. Mohammed Habib, Video Services Division.³⁰

14. Meanwhile, WBSP-LP was fast approaching another anniversary of its station's silence authority and wanted to resume operations. On May 23, 2000 it filed an STA request to operate with the facilities specified in its July 23, 1998 STA.³¹ Remarkably, these were the same facilities Caloosa repeatedly claimed were inoperable because of interference to the Naples cable television system.

15. WBSP-LP modified its May 23, 2000 STA request in a letter dated June 9, 2000 from Dennis J. Kelly to Mohammed Habib.³² The modified WBSP-LP facilities varied from the facilities specified in the July 18, 1998 STA in that effective radiated power was reduced from 3.54 watts to 2.4 watts and the antenna height of the center of radiation was reduced from 9.1 meters AGL to 8.4

²⁸

This document was not made available for public inspection at the Commission when this pleading was being prepared.

²⁹

See Letter dated February 29, 2000 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation.

³⁰

See Letter dated June 14, 2000 from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch to Caloosa Television Corporation.

³¹

See Letter dated May 23, 2000 from Dennis J. Kelly to Federal Communications Commission.

³²

WBSP-LP filed a further clarification of its technical proposal on June 20, 2000. See Letter dated June 20, 2000 from Dennis J. Kelly to Mohammed Habib.

meters. The reason given for these minor reductions in operating parameters was that they were made to avoid interference to the MediaOne cable system headend.³³

16. True to past practices: Caloosa did not wait for grant of its STA request to commence operations with its proposed WBSP-LP facilities. It returned WBSP-LP to the air on June 17, 2000.³⁴ Caloosa's STA request was granted three days later."

17. During the pendency of Caloosa's May 23, 2000 STA request, the Mass Media Bureau acted on Caloosa's January 28, 2000 Statement of Eligibility for Class A Low Power Television. In the Dismissal Order released June 9, 2000, the Chief, Mass Media Bureau dismissed WBSP-LP's statement of Class A eligibility as materially deficient. This action came at a time when FMBC's petition for rulemaking was pending to allot DTV Channel 9 to Fort Myers, Florida for use by WINK-DT. FMBC's petition subsequently resulted in issuance of Notice of Proposed Rulemaking MM Docket No. 00-180, 15 FCC Rcd. 19337 (2000), proposing allotment of DTV Channel 9 to Fort Myers.

18. On July 10, 2000 Caloosa filed a petition for reconsideration of the dismissal of WBSP-LP's Class A statement of eligibility. No public notice was given of the filing of this petition and, therefore, no one had an opportunity to oppose it. Caloosa's petition claimed that "due to technical difficulties" WBSP-LP was "temporarily off the air during the 90 day period ending

³³

Query why these reductions were not made in August 1998 when Caloosa discovered its problems with interference to the CATV headend?

³⁴

See Letter dated June 22, 2000 from Dennis J. Kelly to Federal Communications Commission.

³⁵

See Letter dated June 20, 2000 from Hossein Hashemzadeh: Supervisory Engineer: LPTV Branch to Caloosa Television Corporation.

November 29, 1999.”³⁶ Caloosa claimed that the Mass Media Bureau’s action dismissing its Class A certificate of eligibility “did not take into consideration that WBSP-LP had been an operating LPTV station in southwest Florida for most of the decade of the 1990s.”³⁷ Caloosa complained that the Mass Media Bureau acted in a blanket fashion and “did not give Caloosa *the* ‘case by case’ review called for by Congress in Section 336(2)(B).”

19. Caloosa’s misleading petition for reconsideration had the intended effect. By letter dated August 11, 2000 the Chief, Video Services Division reversed the ruling of the Chief, Mass Media Bureau³⁸ and declared Caloosa Television Corporation eligible to file an application for Class A status. This letter ruling was not placed on public notice and, therefore, no one was able to challenge it on reconsideration

20. This takes us to WBSP-LP’s present application, filed July 12, 2001, to convert its LPTV construction permit facilities to Class A facilities. This application was placed on public notice as accepted for filing on August 10, 2001, the same day it was granted. Public Notice of the grant was given August 15, 2001. Once again no one had an opportunity to challenge Caloosa’s claim to Class A status prior to FCC action.

³⁶

WBSP-LP neglected to mention that it had lost its transmitter site; that it was off the air until June 17, 2000; and that it had operated only 12 days during the period from August 8, 1997 through June 16, 2000.

³⁷

WBSP-LP had, of course; previously claimed that it operated as a translator. See supranote 4. And it hardly operated at all after August 1997.

³⁸

Query whether the Chief, Video Services Division had authority to grant reconsideration reversing the rulings of the Chief, Mass Media Bureau? See Rule 1.106(a)(1), which states, in pertinent part, “Petitions seeking reconsideration of other final actions *taken* pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission.”

II. Argument

Caloosa's License to Operate WBSP-LP was Forfeited on August 7, 1999 by Operation of Law

21. In August 1997, WBSP-LP's license specified a transmitter location at 4451 Gulf Shore Boulevard North in Naples, Florida. The station ceased transmitting from this site on August 8, 1997 and, by March 31, 1998, had lost its right to use its licensed site.

22. WBSP-LP was granted on ST.4 on July 23, 1998 to operate from the Naples, Florida cable television headend. It ceased operations under this STA on August 7, 1998 due to substantial interference to cable channel 9. The STA expired January 23, 1999 and was not replaced until June 20, 2000. In other words, during the period from January 23, 1999 through June 20, 2000, WBSP-LP had no authority to operate from anywhere except a transmitter site it lost prior to March 31, 1998.

23. Section 312(g) of the Communications Act of 1934, as amended, 47 USC §§151 et seq., (the "Communications Act") provides:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

FMBC submits that the nineteen month lapse in WBSP-LP's operating authority requires forfeiture of the station's broadcast license under the provisions of Section 312(g).

24. FMBC notes that Caloosa claims Station WBSP-LP was on the air eleven days during the nineteen month period that its operating authority lapsed. If this is so, Caloosa was clearly operating at a variance from its license in violation of Section 312(a)(3) of the Communications Act. Such repeated violations of Section 312(a)(3) could subject the station to license revocation. However, a more appropriate application of Section 312 to the facts of this case would be to hold

that operating a station in violation of Section 312(a)(3) is *not* effective to prevent automatic license forfeiture under Section 312(g).

25. In this *connection*, FMBC submits that WBSP-LPs intermittent operation was *intended to* meet the bare *minimum* necessary to retain the station's license. Specifically in July 1998 the station returned to the air and operated seven days to avoid both operation of Section 312(g) and the FCC policies prohibiting grant of license renewals to silent stations.³⁹ In June 1999, Caloosa returned the station to the air, without operating authority, and ran it eight days in a second attempt to avoid operation of Section 312(g). This pattern continued into June 2000, when the station again returned to the air without operating authority, again in anticipation of the consequences of Section 312(g).

26. FMBC submits that Caloosa, having devised a minimalist approach to service, must accept the consequences of its failure to preserve WBSP-LPs operating authority. Any consequence other than automatic forfeiture of WBSP-LP's license would create a conflict between the prohibitions of Sections 312(a)(3) and 312(g) of the Communications Act. It would be remarkably poor public policy if Caloosa were permitted to avoid the forfeiture provisions of Section 312(g) by wilfully and repeatedly transmitting signals in violation of Section 312(a)(3) of the Communications Act. Keep in mind that WBSP-LP was operating, without authorization, from facilities that, by its own admission, interfered with the Naples, Florida CATV headend.

39

See e.g., Timnankin, Inc., 37 FCC 2d 680 (1972).

The Video Services Division's Action. Reversing the Chief. Mass Media Bureau's Decision
in the Dismissal Order was Void Ab Initio

27. Section 405(a) of the Communications Act states, in pertinent **part**:

After an order, decision, report or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under Section 5(c)(1), any party thereto, or any *other* person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority, making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under Section 5(c)(1), ~~in~~ its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear....The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in **part**, and ordering such further proceedings as may be appropriate...⁴⁰

This statutory scheme clearly contemplates that action taken by a designated authority, under a delegation of authority pursuant to Section 5(c)(1) of the Communications Act, will be reconsidered by that same designated authority or the Commission, itself, upon the filing of a petition for reconsideration →

28. Station WBSP-LP's statement of eligibility for Class A lower power status was dismissed by the Chief, Mass Media Bureau in the Dismissal Order of June 9, 2000. On July 10, 2000 Caloosa filed its petition for reconsideration and on August 11, 2000 the Chief, Video Services Division issued a letter purporting to grant Caloosa's petition and to reverse the action of a superior authority, the Chief, Mass Media Bureau. FMBC submits that the Chief, Video Services Division has no delegation of authority under Section 5(c)(1) of the Communications Act to dispose of petitions seeking reconsideration of actions of the Chief, Mass Media Bureau. Such a delegation

40

Similar requirements are also included in FCC Rule 1.106, 47 CFR 91.106

would contravene the statutory reconsideration procedures set out in Section 405 of the Communications Act.

29. It is well settled that an agency's failure to follow its own regulations is fatal to its deviant action. See Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356, 1359 (D.C. Cir. 1979). This maxim applies a fortiori when the agency's action ignores the requirements of its authorizing statute. See Interstate Broadcasting Company, Inc., 2 FCC Rcd. 4051 (Audio Services Div. 1987). The August 11, 2000 action of the Chief, Video Services Division reversing the Dismissal Order was taken without authority, contravened the FCC's rules and authorizing statute and is, therefore, void. The Dismissal Order remains in effect.

WBSP-LP Was Never Eligible for Class A Status and Its Application for Class A Status
Was Granted on the Basis of Factual Errors and Omissions.

30. On November 29, 1999 Congress established a statutory scheme for the purpose of conferring protected status on a small number of low power television license holders who "operated their stations in a manner consistent with the programming objectives and hours of operation of full-power broadcasters providing worthwhile services to their respective communities while under severe license limitations compared to their full power counterparts."⁴¹ Congress' plan envisioned that a "qualifying low power television station" would be afforded primary status as a television broadcaster "as long as the station continues to meet the requirements for a qualifying low power

41

See Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat 1501 (1999), codified at 47 USC §336(f) (hereinafter, the "CBPA").

station....”⁴² Congress defined a qualifying low power television as a station which, during the 90 day period prior to adoption of the CPBA, (a) broadcast a minimum of 18 hours per day, (b) broadcast an average of 3 hours per week of local programming, and (c) complied with the Commission’s requirements applicable to low power television stations.⁴³

31. When WBSP-LP filed its January 28, 2000 Statement for Eligibility for Class A Status, it was unable to certify to any of the statutory criteria that would have qualified it for Class A status. It claimed to be “temporarily off the air due to equipment failure” and asked to be granted Class A status on the basis of commonly-owned station WEVU-LP’s broadcast performance.

32. WBSP-LP’s certificate of eligibility carefully shaded the truth with respect to the station’s off-the-air status. WBSP-LP’s “temporary” silence ultimately spanned the three year period from August 8, 1997 through June 17, 2000: excluding the days July 31- August 7, 1998 and June 14 - 22, 1999.⁴⁴ The station lost its transmitter site some time before March 1998 and did not propose a transmitter site even marginally suitable for broadcast operations until September 18, 2000.⁴⁵ Instead, what little service the station did provide in August 1998 and June 1999 was at the expense of the Naples cable television operation, which experienced unacceptable interference from

⁴²

See 47 USC §336(f)(1)(A)(ii)

⁴³

See 47 USC §336(f)(2). The Commission was also granted additional authority to award Class A status to stations if the public interest convenience and necessity would be served by such a grant.

⁴⁴

If we count only authorized broadcast operations, Station WBSP-LP was not operating as authorized in June 1999.

⁴⁵

See Letter dated September 15, 2000 from Dennis J. Kelly to Federal Communications Commission. The site proposed conflicted with a pending application for Station WPLG-TV which did not object to the site’s specification.

WBSP-LP to its headend.

33. Clearly the Chief, Mass Media Bureau acted correctly in dismissing WBSP-LP's certificate of eligibility. The facts belie Caloosa's claim that the station was temporarily off the air. The cause of the station's lengthy silent status was Caloosa's own three year failure to find a suitable transmitter site and its unwillingness to repair and maintain the station's equipment.⁴⁶

34. Caloosa's July 10, 2000 petition for reconsideration of the Dismissal Order was a thoroughly disingenuous exercise in misdirection. The petition feigned injury from the Dismissal Order's alleged failure to give WBSP-LP "the 'case by case' review called for by Congress..." Meanwhile, the petition strained to characterize WBSP-LP as "an operating LPTV station in southwest Florida for most of the decade of the 1990s" that "due to technical difficulties" was "temporarily off the air during the 90 day period ending November 29, 1999."

35. FMBC submits that any realistic appraisal of WBSP-LP's performance must confirm the correctness of the Dismissal Order. Station WBSP-LP was not temporarily off the air. It was off the air for almost three years. WBSP-LP had not been operated in conformity with FCC rules governing low power television stations. The station operated repeatedly without any authorization whatsoever, in direct violation of Section 312(a)(3) of the Communications Act. When the station did transmit, by its own admissions, it jammed the local CATV headend. Indeed the station had been silent to such an extent that proper application for Section 312(g) of the Communications Act requires forfeiture of its license.

46

Caloosa did not even have technicians available in Naples capable of repairing its transmitter. Instead, it repeatedly shipped the transmitter to its commonly owned Tennessee television station for repair.

36. The so-called causes of WBSP-LP's lengthy silence were events wholly within the control of Caloosa. Caloosa delayed three years in finding a permanent transmitter site for the station. Caloosa failed to maintain the station's transmitter in operating condition. Caloosa's game plan was transparently clear. Its repeated silence requests were designed to operate WBSP-LP the minimum number of days to (a) obtain renewal of the station's license, and (b) prevent automatic forfeiture of the license under Section 312(g) of the Communications Act.⁴⁷

37. In adopting rules for the Class A television service, the Commission established standards for evaluating the certificates of eligibility filed by low power television stations which were unable to satisfy the statutory programming and operational standards. It stated:

We will allow deviation from the strict statutory eligibility criteria only where such deviations are insignificant or when we determine that there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation. Examples of such compelling circumstances include a natural disaster or interference conflict which forced the station off the air during the 90 day period before enactment of the CBPA.⁴⁸

As demonstrated above, WBSP-LP's deviation from the statutory programming and operational standards was significant and was caused by factors within Caloosa's control. No equitable considerations warrant grant of Class A status to a station kept off the air almost three years.

38. Indeed equitable considerations require denial of WBSP-LP's application for Class A status. Specifically: WBSP-LP's protracted silence was apparently part of an intentional plan to minimize the station's operations. Even a modest effort to repair and relocate the station could have succeeded much sooner than the three years Caloosa took for the project. For three years, Caloosa

⁴⁷ FMBC submits Caloosa's miscalculations frustrated this second objective. See *infra* paras. 21-26

⁴⁸ See Establishment of a Class A Television Service, 15 FCC Rcd. 6355, 6369 (2000).

spent next to nothing on maintenance of its equipment, next to nothing for a transmitter site and next to nothing to operate WBSP-LP.

39. Conversely, after release of the Dismissal Order, FMBC diligently prosecuted its rulemaking proposal in MM Docket No. 00-180 seeking substitution of DTV Channel 9 for DTV Channel 53 in Fort Myers, Florida. FMBC relied on the dismissal of WBSP-LP's Class **A** certification and had no opportunity subsequent to the Dismissal Order to oppose the unpublished letter purporting to reinstate WBSP-LP's eligibility for Class **A** status.

40. FMBC submits that substantial public interest benefits will result from the substitution of an in-core television DTV allotment for the present out-of-core DTV allotment for WINK-TV. In this connection: the Commission has specifically recognized the burden placed on licensees with out-of-core DTV allotments and committed "to further reduce the number of out-of-core allotments in any future amendments to the Table." See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, MM Docket No. 87-268, 13 FCC Rcd. 7418, 7440-41 (1998).

41. As previously noted, WBSP-LP's Class **A** status derives not from compliance with the CBPA criteria for qualifying low power stations, but from the Commission's discretion to award Class **A** service under a public interest standard. Under these circumstances, the Commission should consider the impact of WBSP-LP's application on the fair, efficient and equitable distribution of television service. Grant of Class **A** status to WBSP-LP would give primary status to a Naples, Florida television translator, *blocking the allotment of an in-core DTV channel for a full power digital television station*. The CBPA did not contemplate protecting mere translator operations and,

for this reason, the Commission specifically excluded television translators from Class A eligibility.

⁴⁹ The DTV allotment proposed in MM Docket No. 00-180 is a far more efficient use of Channel 9 than the use advanced in Caloosa's application.

42. Any objective weighing of equities in this proceeding should conclude that WBSP-LP is not the type of LPTV station Congress sought to protect through the CBPA. It has no substantial record of service to the public and this lack of service is the direct result of Caloosa's own policies with respect to the station. On the other hand, equities favor grant of the in-core DTV allotment advocated by FMBC in MM Docket No. 00-180, an allotment that will otherwise be impeded by grant of Class A protection to WBSP-LP.

III. Conclusion

43. In view of the foregoing, FMBC submits that the license of WBSP-LP should be declared forfeit pursuant to Section 312(g) of the Communications Act. In the alternative FMBC asks that the Chief, Mass Media Bureau vacate the August 11, 2000 action of the Chief, Video Services Division and deny Caloosa's July 10, 2000 petition for reconsideration of the Dismissal Order. In any case, there is no legal or factual basis to support an award of Class A status to Station

49

See Establishment of a Class A Television Service, 15 FCC Rcd. 6355, 6369 (2000).

WBSP-LP and, therefor, the above-captioned application of Caloosa to convert WBSP-LP to Class
A status should be dismissed or denied

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph A. Belisle". The signature is fluid and cursive, with the first name "Joseph" and last name "Belisle" clearly distinguishable.

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CERTIFICATE OF SERVICE

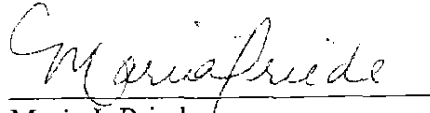
I, Maria Priede, hereby certify that I have this 30th day of August, 2001 caused a copy of the foregoing "Petition for Reconsideration or, in the Alternative. for Declaratory Ruling" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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